58296-8

58296-8

80588-1

No. 58296-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, a Washington Non-Profit Corporation; and NORTHSHORE UNITED CHURCH OF CHRIST, a Washington Public Benefit Corporation,

Appellants,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent / Cross-Appellant.

REPLY BRIEF AND RESPONSE OF APPELLANT SHARE/WHEEL

Sean A. Russel
WSBA No. 34915
Attorneys for Appellant
SHARE/WHEEL

TODD & WAKEFIELD, PS
1501 Fourth Avenue, Suite 1700
Seattle, WA 98101
Telephone: (206) 622-3585
Facsimile: (206) 583-8980

TABLE OF AUTHORITIES

Washington Cases

Page

Rules

Page

Statutes

Page

I. ARGUMENT

A. THE RESPONDENT'S AMENDED COMPLAINT FOR SPECIFIC PERFORMANCE SHOULD NOT HAVE BEEN CONSOLIDATED WITH THE HEARING FOR INJUNCTIVE RELIEF.

1. The Nature Of The Lawsuit Changed When The Respondent Filed Its Amended Complaint For Specific Performance.

The Respondent contends that the Appellants should not have been surprised when the Respondent filed an amended claim for specific performance. [Respondent's Brief, pp. 7-11.] In doing so, the Respondent de-emphasizes important procedural history, representations, and testimony that establishes that neither the Honorable Charles Mertel of the King County Superior Court, nor the Appellants knew until the last possible minute prior to the May 30, 2006 hearing that the Respondent was seeking specific performance of the 2004 Temporary Property Use Agreement ("2004 Agreement").

The parties agree that the Respondent did not so much as mention the 2004 Agreement as applicable to the 2006 encampment until the Respondent sought a Temporary Restraining Order ("TRO") preventing Tent City 4 from occupying property within the City of Woodinville on May 12, 2006. The Respondent contends that the mere mention of the 2004 Agreement on May 12, 2006 provided adequate notice that the

Respondent would be seeking specific performance. The Respondent is overreaching. In reality, the Respondent's reference to the 2004 Agreement at the May 12, 2006 TRO hearing merely established for the first time that (1) the 2004 Agreement existed; and, (2) the City believed that it applied in some manner to the proposed 2006 encampment.

The Respondent also contends that proper notice of its request for specific performance of the 2004 Agreement was provided when it filed its Motion to Quash the Existing Temporary Restraining Order; and for Preliminary and Final Injunction [sic] Relief Prohibiting the Tent City 4 Homeless Encampment on R-1 Zoned Property in the City of Woodinville and from Relocating Anywhere in the City of Woodinville Without First Obtaining All Permits Required by City Ordinance ("Motion for Injunctive Relief") on May 22, 2006. [Respondent's Response and Opening Brief, pp. 8-11.] Again, the Respondent is overreaching. In reality, the Respondent requested only the following relief:

> 1. Quash the temporary restraining order entered May 12, 2006, allowing defendant Northshore United Church of Christ and defendant SHARE/WHEEL to cite pending full hearing on the plaintiff's motion for preliminary injunction, a homeless encampment on defendant NUCC's real property without a valid permit and a violation of applicable zoning regulations;

2. Order the trial of the action on the merits to be advanced and consolidated with the hearing on this motion for preliminary injunction as authorized by CR 65(a)(2);

3. Order of preliminary injunction based upon the grounds for issuance of injunctive relief set forth in either or both: (a) RCW 7.40.020; (b) RCW ch. 7.48 and WMC 1.03.030;

4. Order that the plaintiff is entitled to relief requested in the complaint and enter the permanent injunctive relief against the defendants requested in the complaint.

[CP 77-148]

The Respondent's Motion for Injunctive Relief does not request specific performance of the 2004 Agreement. The relief requested by the Respondent is limited to that which is identified above.

On May 25, 2006, SHARE/WHEEL and the NUCC filed their opposition briefs to the Respondent's Motion for Injunctive Relief. [CP 226-247, 350-362] The Appellants opposed the Respondent's Motion for Injunctive Relief with the understanding that the parties would appear at 8:30 a.m. on May 30, 2006 to present oral argument in support of their respective positions. At that time, all indications were that the May 30, 2006 hearing would be limited to oral argument and last no more than the morning hours. Certainly, it was not anticipated that the hearing would extend beyond morning of May 30th, much less over the course of several days.

On the evening of May 26, 2006—the Friday immediately preceding the three-day Memorial Day holiday weekend, and the last business day before the May 30, 2006 hearing—the Respondent served the Appellants with its reply brief. [CP 368-400] Once again, the only relief requested was that previously identified in its Motion for Injunctive Relief. The Respondent addressed the applicability of the 2004 Agreement to the present matter, and for the first time, expressed in argument that it believed that Appellants breached the 2004 Agreement. The Respondent's reply brief also included, for the first time and in a footnote, a reference that it intended file an amended complaint seeking specific performance of the 2004 Agreement. [CP 372]

At 8:30 a.m. on May 30, 2006, the parties appeared before the Honorable Charles Mertel to present oral argument on the Respondent's motion for injunctive relief. After a brief introduction, Judge Mertel announced that he would extend the duration of the hearing indefinitely and admit live testimony. [VRP, May 30, 2006, pp. 9-10.] Needless to say, this came as a complete surprise to the parties because, prior to Judge Mertel's announcement, the parties had briefed and prepared for a short oral argument on the plaintiff's motion for injunctive relief.

Apparently concerned about whether the Amended Complaint for Specific Performance was served and filed, the Respondent notified the parties in open court that it was seeking specific performance of the 2004 Agreement through based on a new claim for breach of contract. Mr. Rubstello, counsel for the Respondent, represented:

> MR. RUBSTELLO: We have prepared an amended complaint that adds a breach of contract claim. We have filed it.
>
> THE COURT: I got that this morning.
>
> MR. RUBSTELLO: I don't know if it got served yet or not, but we will be asking for a specific performance and damages in that context with respect to those claims.
>
> THE COURT: Yeah, I got the amended complaint on my desk this morning. Okay, all right, hear from the other side.
>
> MR. RUBSTELLO: Absolutely.
>
> THE COURT: And then we will get in to the witnesses. Okay.
>
> MS. HAYES: Morning, Your Honor.
>
> THE COURT: Ms. Hayes.
>
> MS. HAYES: Lisa Hayes here. At the outset, I would like to point out that the amended complaint and the original complaint and the summons for those complaints have not been served on either of the defendants. Personal service has not taken effect in this case and, frankly, the court doesn't have jurisdiction to enter a preliminary injunction against either defendant because neither have been served.

[VRP, May 30, 2006, pp. 14-16.]

Although the Respondent contends that the Appellants had sufficient notice and should have not been surprised by its amended complaint, the procedural history—and representations of the Respondent's own counsel—establishes that there was still question as to whether the parties and the trial court had notice of the amended complaint as of May 30, 2006.

The circumstances surrounding the Respondent's request for specific performance, by itself, prejudiced the Appellants by presenting a new claim that required separate analysis and significant preparation from those that were scheduled to be argued on the morning on May 30, 2006. The Appellants were further prejudiced when the trial court completely changed the nature and landscape of the hearing by extending the proceedings indefinitely and admitting live testimony from numerous witnesses.

The Respondent's contention that the Appellants were not surprised by its amended complaint for specific performance is simply incorrect. At the outset of this matter, the May 12, 2006 TRO hearing, the parties were merely seeking to establish the rights of Tent City 4 as they concerned temporarily occupying property owned by the NUCC.

By the time the May 30, 2006 hearing commenced, the Respondent's initial attempt to prevent Tent City 4 from occupying the property owned by the NUCC through the issuance of a TRO had morphed into a complex, multi-party action, seeking both injunctive and legal relief. As is discussed below, the trial court, based on the complexity of the circumstances presented on the morning of May 30, 2006, should not have consolidated the legal issues presented in the Respondent's Amended Complaint with the Respondent's Complaint for Injunctive Relief.

2. The Trial Court Should Have Gone Beyond The Pleadings To Ascertain The Real Issues In Dispute Before Deciding Whether To Consolidate The Claims In The Respondent's Original Complaint and Amended Complaint.

The Respondent quickly dismisses the Appellant's constitutional right to a jury trial on dicta from Kim v. Dean, 133 Wn. App. 338, 135, P.3d 978 (2006). However, Kim does not limit the criteria established in Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 467 P.2d 372 (1970), which provides, in relevant part:

> (1) Great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (2) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted.

Scavenius, 2 Wn. App. at 128 (emphasis added).

Here, as discussed above, the nature of the action on May 30, 2006 was a different animal from it started as on May 12, 2006. In fact, a majority of the changes to the Respondent's action occurred between the evening of May 26, 2006—the Friday before the three-day Memorial Day weekend—and 8:30 a.m. on May 30, 2006. These circumstances were further complicated by the trial court's spontaneous continuation of the hearing and willingness to admit live testimony from witnesses who were for the most part, as of 8:30 a.m. on May 30, 2006, unknown. [VRP, May 30, 2006, pp. 9-11, 52, ll. 8-17.]

The trial court's ruling establishes that it likely applied the general principle provided in Kim, which merely requires a balancing of the issues to determine whether or not to jury trial. However, the trial court erred by not "go[ing] beyond the pleadings to ascertain the real issues." Had it done so, it would likely have concluded that the Respondent's Complaint for Injunctive Relief should not have been consolidated with its Amended Complaint for Specific Performance for the reasons discussed above. Consequently, SHARE/WHEEL respectfully requests that the Court reverse and remand the trial court's ruling that the Appellants breached the 2004 Agreement.

3. Preserving The Issue Of Damages For A Jury Trial Does Not Satisfy The Appellants' Constitutional Right To A Jury Trial On The Respondent's Amended Complaint For Specific Performance.

The Respondent contends that the Appellants' constitutional right to a jury trial was not violated because the issue of damages under the 2004 Agreement "is reserved for later determination on the regular course." [CP 481-82] However, the Respondent is placing the cart before the horse.

For the reasons set out above, the Appellants were entitled to jury trial on all of the issues presented in the Respondent's Amended Complaint for Specific Performance. Proceeding to trial on the issue of damages does not preserve the Appellants' constitutional right to a jury trial. Rather, it presupposes the issue of liability and perpetuates the trial court's error of consolidating the Respondent's claims.

Trying the issue of damages to a jury would prejudice the Appellants because the Appellants would be appearing with the predetermination of liability. Moreover, the Appellants would be denied the opportunity to conduct discovery on the issue of liability. The Respondent contends that there was sufficient time to conduct adequate discovery on the claims presented in it Amended Complaint for Specific

Performance. [Respondent's Brief, pp. 13-14.] The Respondent is incorrect.

As discussed above, the parties believed that the May 30, 2006 hearing would be comprised of the presentation of oral argument and last no more than the morning session. Thus, counsel for the Appellants, who are appearing *pro bono*, had not scheduled the "two-week" period that the Respondent contends was available for depositions of City of Woodinville employees. In addition, the Appellants only learned the identify of the Respondent's witnesses 24 hours in advance of their actual testimony. [VRP, May 30, 2006, p. 52, ll. 8-12.] Finally, the parties spent the better part of the first week—the period in which the Respondent was putting on its case and calling its witnesses—in mediation. Thus, assuming that counsel for the Appellants had cleared two weeks to take depositions, it was not possible during the first days of the hearing—the days that the Respondent was presenting its case-in-chief—because time out of court was spent attempting to resolve the dispute through mediation.

B. THERE IS SUBSTANTIAL EVIDENCE THAT THE 2004 AGREEMENT DID NOT APPLY TO THE 2006 ENCAMPMENT.

1. In Addition To The Language Of The 2004 Agreement, The Trial Court Should Have Considered Testimony And Actions Of The Appellants' Representative And The Respondent's Employees.

The Respondent contends that although the 2004 Agreement is unambiguous, extrinsic evidence should be admitted for the purpose of establishing the clarity of its contents. [Respondent's Response and Opening Brief, pp. 15-16.] Yet, the only extrinsic evidence that the Respondent seeks to admit is testimony of City of Woodinville employee Rose. As identified in SHARE/WHEEL's Opening Brief, SHARE/WHEEL does not believe that Mr. Rose's testimony accurately reflects the true state of events surrounding the drafting of the 2004 Agreement. In addition, SHARE/WHEEL does not believe that the contract language can stand on its own.

By assigning error to the trial court's conclusion that the Appellants breached the 2004 agreement, SHARE/WHEEL challenged the trial court's finding that the 2004 Agreement is unambiguous. As set out in SHARE/WHEEL'S opening brief, the trial court should have considered the contents of the 2004 Agreement; the testimony regarding its drafting and intended applicability; and the actions of the contracting

parties to conclude that the 2004 Agreement was only intended to apply to the 2004 encampment. [SHARE/WHEEL's Opening Brief, p. 17.]

The Respondent invites the Court to limit its review concerning the applicability of the 2004 Agreement to (1) the language of the 2004 Agreement; and (2) Mr. Rose's testimony that Section 2(B) was a "future consideration." [Respondent's Response and Opening Brief, pp. 16-19.] However, the Court should also consider Mr. Rose's action—or inaction—leading up to the Respondent's TRO, and the testimony of SHARE/WHEEL and NUCC representatives.

Although Mr. Rose testified that he believed that the 2004 Agreement would extend indefinitely, he nonetheless recommended approval of the Appellants' land use permit.

> THE COURT: Hold on. Let me understand. The time that you recommended – or your recommended to the counsel they approve this temporary use permit, you were aware of the 2004 agreement where they were – where they had, well, whatever the agreement said, you knew about that?
>
> THE WITNESS: I knew about that.
>
> THE COURT: Still, despite that, or whatever, you went ahead and said to the council, "Let's approve this"?
>
> THE WITNESS: Yes, sir.

[VRP, June 1, 2006, pp. 13-15.]

Mr. Rose also testified that he believed the that the 2004 Agreement ended on a date certain:

> MR. RUSSEL: Mr. Rose, back to the end of the first paragraph, the language that I quoted, the city manager amended the [2004] agreement to end November 1 or the end of the UP (sic) process, whichever came first. Was that an accurate statement?
>
> MR. ROSE: I believe so.

Testimony provided by SHARE/WHEEL's Mr. Morrow provides further support for the contention that the 2004 Agreement did not apply to the 2006 encampment. Mr. Morrow testified that he did not believe, based on his role as a participant in the negotiation and drafting process, that the 2004 Agreement applied to the 2006 encampment. [VRP, June 6, 2006, pp. 46-48.]

Finally, NUCC Pastor Paul Forman also believed that the 2004 Agreement did not apply to the 2006 encampment. Pastor Forman would not have knowingly advised the NUCC to host Tent City 4 had he believed that the 2004 Agreement applied to the 2006 encampment. [VRP, June 6, 2006, pp. 21-22.]

The evidence presented establishes that the 2004 Agreement, in and of itself, does not produce a clear result concerning its applicability to the 2006 encampment. Therefore, extrinsic evidence should be relied on

to determine the parties' intent. Contrary to the Respondent's contentions, the extrinsic evidence should not be limited to Mr. Rose's testimony that he believed the 2004 Agreement to have indefinite applicability. Mr. Rose's actions should be considered, along with the testimony of Mr. Morrow and Pastor Forman. The evidence leads to one result: the 2004 Agreement did not apply to the 2006 encampment.

Consequently, SHARE/WHEEL respectfully requests that the Court reverse the trial court's ruling that (1) the 2004 Agreement was unambiguous; and (2) that the Appellants breached the 2004 Agreement.

2. The Terms Of The 2004 Agreement Should Apply Equally To All Contracting Parties.

All contracting parties were bound to perform the terms of the contract. See Metro Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986). Assuming, *arguendo*, that the 2004 Agreement applied to the 2006 encampment, the Respondent breached the 2004 Agreement well before the Appellants allegedly breached.

Section 2(B) creates an obligation on behalf of the Respondent to, at the very least, accept an application for a land use permit. If the 2004 Agreement only created obligations for the Appellants, it would be unenforceable for lack of mutuality. See Brem-Rock, Inc. v. Warnack, 28

Wn. App. 483, 489 n.8, 624 P.2d 220 (1981), overruled on other grounds by, French v. Sabey Corp., 134 Wn.2d 547, 557, 951 P.2d 260 (1998).

The Respondent relies on Section 33 to support its contention that it is somehow exempted from contractual obligations under the 2004 Agreement. The Respondent's contention must fail. If the 2004 Agreement applies to the 2006 encampment, both parties had an obligation to perform under its terms. Washington law does not support exempting the Respondent from its obligations under the 2004 Agreement. Therefore, the Court should rule that the Respondent was the first breaching party of the 2004 Agreement in the event that it finds that the 2004 Agreement applied to the 2006 encampment.

C. VIOLATION OF ZONING REGULATION IS ONLY A NUISANCE PER SE IF THE ZONING REGULATION PROHIBITS THE SPECIFIC ACTIVITY.

The Respondent contends that the presence of Tent City 4 constituted a nuisance per se as a matter of law. The Respondent misinterprets the authority it relies on for support.

In City of Mercer Island v. Steinman, 9 Wn. App. 479, 485, 513 P.2d 80 (1973), the court recognized that that the Mercer Island Municipal Code stated that any use of property contrary to the ordinance is a public nuisance. Unlike the Mercer Island Municipal Code, the Woodinville

Municipal Code does not contain such a provision. Thus, Steinman is distinguishable.

The Respondent cites WMC 1.03.030, WMC 1.06.160 and WMC 1.07.030 to support its contention that this matter is consistent with Steinman. However, WMC 1.03.030 merely preserves legal remedies for abating "nuisances." WMC 1.06.160 provides authority for Respondent to seek equitable relief to abate conditions that violate the WMC, and WMC 1.07.030 identifies and defines actions that violate the WMC. None of these provisions states that use of property contrary to the WMC is a public nuisance. Therefore, Steinman is not controlling in this matter.

The City also relies on Kitsap County v. Kev, Inc., 106 Wn.2d 135, 720 P.2d 818 (1986). The Kev decision is also distinguishable. In Kev, Kitsap County enacted an ordinance that put time, place and manner restrictions on topless and erotic dancing in Kitsap County. Kev, 106 Wn.2d at 136. Basing its decision on the specific ordinance governing topless and erotic dancing, the Kev court stated:

> Engaging in any business or profession in defiance of a law regulating or prohibiting the same . . . is a nuisance per se.

Kev, 106 Wn.2d at 138. It continued:

> This indicates a decision by the legislative body that the regulated behavior warrants enjoining, and that the violation itself is an injury to the community.

Kev, 106 Wn.2d at 139, quoting County of King ex. Rel. Sowers v. Chisman, 33 Wn. App. 809, 658 P.2d 1256 (1983). Here, unlike Kev, there is no ordinance that specifically governs homeless encampments. Therefore, Kev is not controlling in this matter.

Finally, the Respondent also relies on W.W. Shields v. Spokane School Dist. No. 81, 31 Wn.2d 247, 196 P.2d 352 (1948). The W.W. Shields case is also not controlling in this matter. The Respondent relies on WMC 1.03.030 to support its contention that Tent City 4 constitutes a nuisance. In that section, titled "nuisance," there is no definition, or even mention of what constitutes a nuisance. Rather, the section addresses what remedies apply for prevention of nuisances. In reality, the WMC only provides remedies for "nuisances," even though we cannot determine what a "nuisance" is under the WMC.

The authority relied on by the Respondent is only helpful in the present matter is there is a WMC provision that establishes that Tent City 4's temporary occupancy of property owned by the NUCC is a nuisance. There is no such provision. Therefore, Tent City 4's temporary occupancy

of property owned by the NUCC cannot be a nuisance as a matter of law, and the trial court's ruling to this effect should be reversed.

D. THE MAY 12, 2006 TEMPORARY RESTRAINING ORDER AND SUBSEQUENT CONTINUANCES WERE NOT "WRONGFULLY ISSUED."

A temporary restraining order is proper when there is a clear showing, based on specific fact, that the applicant will suffer irreparable injury, loss, or damage before an adversary hearing can be convened in open court. Fisher v. Parkview Properties, Inc., 71 Wn. App. 468, 859 P.2d 77 (1993). A temporary restraining order is "wrongfully issued" when "it would not have been ordered had the court been presented all the facts." Fisher, 71 Wn. App at 474; quoting Knappett v. Locke, 19 Wn. App. 586, 592, 576 P.2d 1327 (1978), aff'd, 92 Wn.2d 643, 600 P.2d 1257 (1979).

The Honorable Palmer Robinson followed a well-established form by which to address the importance of siting Tent City under an emergency situation. Judge Robinson, faced with the daunting task of making a quick decision that would have an impact on the lives of scores of vulnerable working poor and homeless individuals, ruled consistent with three previous trial court decisions allowing Tent City to remain on the property until the matter could be properly addressed at a full hearing

on injunctive relief. [CP 72-76] There was a clear showing that Tent City 4 would suffer irreparable injury, loss and damage if a TRO was not entered and a full hearing on injunctive relief was not allowed to occur. Therefore, the May 12, 2006 TRO was not "wrongfully issued."

Judge Robinson's decision, under the circumstances, was appropriate. At the time she made her decision, Judge Robinson was presented with "all the facts." At that time, the Respondent was only seeking injunctive relief. However, two weeks later, the Respondent amended its complaint by seeking specific performance of the 2004 Agreement, which completely changed the nature and outcome of the hearing. The bases upon which injunctive relief was granted was completely different than was presented prior to the entry of the TRO on May 12, 2006. The Respondent's Amended Complaint presented new claims that presented new facts that were irrelevant on May 12, 2006.

Consequently, SHARE/WHEEL respectfully requests that the Court affirm the issuance of the TRO and subsequent continuances.

E. THE TRIAL COURT DID NOT ERR IN DENYING THE RESPONDENT'S MOTION FOR ATTORNEY FEES.

The rule in Washington is that absent a contract, statute, or recognized ground of equity, attorney's fees will not be awarded as part of the cost of litigation. Blueberry Place Homeowners Ass'n. v. Northward

Homes, Inc., 126 Wn. App. 352, 358, 110 P.3d 1145 (2005); citing Pennsylvania Life Insurance Co. v. Dept. of Employment Sec., 97 Wn.2d 412, 413, 645 P.2d 693 (1982). The court may exercise its discretion in determining whether to award costs and attorneys fees. Cornell Pump Co. v. City of Bellingham, 123 Wn. App. 226, 98 P.3d 84 (2004).

The Respondent contends that it is entitled to attorneys fees incurred during the period between May 13, 2006, the first full day in which the May 12, 2006 TRO was operable, to June 12, 2006, the day the Court issued its Final Order. [Respondent's Response and Opening Brief, pp. 49-51.] The Respondent contends that it is entitled to attorneys fees as a matter of equity and relies on Alderwood Associates v. Washington Environmental Council, 96 Wn.2d 230, 635 P.2d 108 (1981) and Ino Ino, Inc. v. Bellevue, 132 Wn.2d 1-3, 937 P.2d 154 (1997) for support. Both decisions are inapplicable in this matter. The Court should consider Gray v. McDonald, 46 Wn.2d 574, 283 P.2d 135 (1955), in deciding the issue presented in the plaintiff's motion.

In Alderwood Associates, defendant Washington Environmental Council ("WEC") requested from the Alderwood Mall Shopping Center the right to gather signatures on its property. Although the Alderwood Mall told the WEC that they could not solicit signatures, the WEC

proceeded to solicit signatures without permission. Alderwood Associates, the owner and operator of Alderwood Mall, sought and obtained a TRO enjoining the WEC from soliciting signatures or demonstrating in the Alderwood Mall Shopping Center. The WEC moved the Court of Appeals for a stay of the injunction pending appellate review, which it granted.

The Washington Supreme Court ruled that the trial court erred in issuing the TRO. The Supreme Court relied on Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1966) in reaching its decision that attorney fees were appropriate.

The Cecil court addressed the issue of whether attorneys fees were recoverable for procuring dissolution of a wrongfully issued injunction when the sole issue at trial was whether a temporary injunction shall be made permanent, and all the evidence presented went to that issue and no other:

> But the facts as to the attorney's fee present an uncommon situation here. In the action resulting in the temporary injunction, the only relief sought at trial on the merits was a perpetuation of the temporary injunction. Issues of act finally to be resolved at trial were identical with the issue temporarily and tentatively resolved in the very show cause hearing out of which came the temporary injunction. The only purpose of a trial on the merits was to decide whether the temporary injunction be made permanent.

* * *

> Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages suffered from the injunction. On this point, the general distinction has been well stated as follows in 2 High, Injunctions § 1686 (4th ed. 1905): (T)he true test with regard to the allowance of counsel fees as damages would seem to be, that if they are necessarily incurred in procuring the dissolution of the injunction, when that is the sole relief sought by the action, they may be recovered; but if the injunction is only ancillary to the principal object of the action and the liability for counsel fees is incurred in defending the action generally, the dissolution of the injunction being only incidental to that result, then such fees can not be recovered.

Cecil, 69 Wn.2d at 291-92 (emphasis added).

In Ino Ino, supra, the plaintiffs challenged the constitutionality of several City of Bellevue ordinances regulating adult businesses. In the process, the court issued a temporary restraining order preventing the City from enforcing the terms of the ordinances. Ino Ino, 132 Wn.2d at 111. At the conclusion of the evidence, the trial court dissolved the temporary restraining order and denied the plaintiff's request for a temporary and permanent injunction, concluding that most of the ordinances were constitutional. Id. at 112. The court also awarded attorney fees for dissolving the temporary restraining order.

On Appeal, the court stated:

> Generally, Washington courts refuse to award attorneys' fees incurred during litigation in the absence of a contract, statute, or recognized ground in equity. On equitable grounds, a party may recover attorneys' fees reasonably incurred in dissolving a wrongfully issued injunction or restraining order.

Id. at 142-43 (emphasis added).

The factual nature of the present matter is distinguishable from that of Alderwood Associates, Cecil and Ino Ino. In each of the cases relied on by the plaintiff, the only issue before the trial court was whether the TRO was wrongfully issued. In this case, the parties argued both issues of whether injunctive relief was appropriate and whether the defendants breached the 2004 Temporary Property Use Agreement. As such, the hearing in the present matter—which occurred over two weeks—was filled with testimony, arguments, and motion practice that related to a variety of topics, not simply whether or not to dissolve the TRO.

The Alderwood Associates, Cecil and Ino Ino courts were presented with much easier tasks of determining and awarding costs and attorneys fees, which is likely why the courts were willing to award them. Because the only issue before the courts was whether the TROs were wrongfully issued, it was appropriate for the courts to award costs and fees

because the hearing was solely concerned with the viability of the TROs. That is not the case in the present matter.

The Respondent's Amended Complaint adding a claim for breach of contract and specific performance of the 2004 Temporary Property Use Agreement distinguishes the present matter from Alderwood Associates, Cecil and Ino Ino. Adding a claim for breach of contract changed the nature of what was supposed to be a hearing for injunctive relief. Instead of simply arguing for or against injunctive relief, the parties were presented with the task of trying to establish whether the 2004 Temporary Property Use Agreement was applicable in 2006, and if so, what effect the terms of the 2004 Agreement had on the present matter. The parties and the trial court invested significant time and money on issues related to the Respondent's amended claim for breach of contract.

The Respondent is attempting to convince the Court that it is entitled to all its costs and fees incurred between May 13, 2006 and June 12, 2006 simply because the May 12, 2006 TRO no longer exists. The Respondent is overreaching.

Michael P. Scruggs, counsel for the Respondent in the lower court, attests that he incurred $16,498.00 in costs and attorneys fees in

attempting to dissolve the "wrongfully issued" May 12, 2006 TRO. Mr. Scruggs allegedly incurred these costs and fees while,

> Reviewing documents, visiting the site of Tent City 4, [in] the preparation of pleadings, preparing for hearing, attending hearings, fact gathering, obtaining statements and declarations, and participating in the mediation arranged by the court.[1]

Greg Rubstello, counsel for Respondent attests that he and attorney J. Zachary Lell incurred $50,586.35 in costs and attorneys fees in attempting to dissolve the "wrongfully issued" May 12, 2006 TRO. Mr. Rubstello allegedly incurred these costs and fees in the,

> Preparation of pleadings, preparing for hearing, attending hearings, and participating in the mediation arranged by the court.[2]

In total, the Respondent requests more than $67,000.00 in costs and attorneys fees—a number that they contend was "reasonable and necessary" to dissolve the May 12, 2006 TRO.

The Respondent cannot rightfully contend that the costs and fees that it requests are appropriate under the authority upon which it relies.

---

[1] The Declaration of Michael P. Scruggs was included in a Supplemental Designation of Clerk's Papers filed with the Superior Court on or about October 23, 2006. Page numbers have not yet been assigned.

[2] The Declaration of Greg A. Rubstello was included in a Supplemental Designation of Clerk's Papers filed with the Superior Court on or about October 23, 2006. Page numbers have not yet been assigned.

Clearly, the costs and fees that it incurred associated with the mediation have nothing to do with "dissolving a wrongfully issued TRO." The sole purpose of the mediation was to explore the possibilities of reaching an agreement concerning Tent City 4's occupation of NUCC property. The Respondent's request for costs and fees associated with the mediation is inappropriate and should be rejected.

The most glaring problem with the Respondent's request for costs and attorneys fees under the authority it cites is that it is impossible to determine what costs and fees were associated with its claim for breach of contract and what claims were associated with its claim for injunctive relief. The problem presented herein was not before the court in Alderwood Associates, Cecil, or Ino Ino. In those cases, determining and awarding attorneys fees would be relatively straight forward because the only issue was whether to dissolve a wrongfully issued TRO. Here, the proceedings that occurred between May 13, 2006 and June 12, 2006 involved a variety of issues—all of which where raised by the Respondent.

Under circumstances such as those presented in his matter, Gray v. McDonald, supra, not the cases cited by the Respondent, provides the applicable standard. The Gray court decided an action to enjoin a party from interfering with the use of a prescriptive easement. The plaintiffs

sought a permanent injunction to enjoin the defendants from constructing a building across a passageway that was an alleged easement. Gray, 46 Wn.2d at 575. Addressing the issue of whether to award attorneys fees, the court stated:

> The trial court further found that plaintiffs and defendants had tried the cause upon the merits, and that, therefore, reasonable attorneys' fees were not allowable as a element of damages. The main issue was whether or not an easement by prescription had been established. The injunctive relief prayed for was only ancillary thereto.

Gray, 46 Wn.2d at 581 (emphasis added).

Here, as in Gray, the trial court entertained several issues other than whether to dissolve the TRO. The hearing consolidated a trial on the merits of the Respondent's breach of contract claim with the hearing for injunctive relief. As a result, the parties briefed and argued a wide variety of issues including those related to the Woodinville Municipal Code (whether Tent City 4 was an "accessory use" and whether Tent City 4 constituted a "nuisance"); State and federal Constitutional issue (whether the NUCC was exercising its religious freedom by hosting Tent City 4); and contract issues (whether the parties breached the 2004 Temporary Property Use Agreement).

Although it appeared at the outset that this matter would solely address whether the TRO should be dissolved, the Respondent's Amended

Complaint adding a claim for breach of contract and the trial court's decisions to consolidate the trial on the merits with the hearing for injunctive relief and hear live testimony added new issues and changed the nature and character of the matter. The issue of whether to dissolve the TRO, rather than being the primary focus of the hearing, became ancillary as the other issues created by the changing nature of the matter evolved. Therefore, under Gray, the trial court correctly denied the Respondent's request for costs and attorneys fees.

Consequently, SHARE/WHEEL respectfully requests that the Court affirm the trial court's order denying the Respondent's request for costs and attorney fees incurred between May 13, 2006 and June 12, 2006.

II. CONCLUSION

Based on the foregoing, appellant SHARE/WHEEL respectfully requests that the Court vacate the King County Superior Court's June 12, 2006 Final Order and remand the matter to the trial court. Additionally, appellant SHARE/WHEEL respectfully requests that the Court affirm the trial court's July 18, 2006 Order Denying City of Woodinville's Motion for Costs and Attorney's Fees.

DATED this 30th **day of** October **, 2006.**

TODD & WAKEFIELD

By _____

Sean A. Russel **WSBA #34915**
Attorneys for Appellant
SHARE/WHEEL

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, a Washington Non-Profit Corporation; and NORTHSHORE UNITED CHURCH OF CHRIST, a Washington Public Benefit Corporation,

Appellants,

vs.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent/Cross-Appellant.

NO. 58296-8-I

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of: Todd & Wakefield.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted the documents entitled: **REPLY BRIEF AND RESPONSE OF APPELLANT SHARE/WHEEL and CERTIFICATE OF SERVICE** on the following persons:

Attorney for Respondent:

Greg Alan Rubstello, Esq. WSBA #6271
Joseph Zachary Lell, Esq. WSBA #28744
OGDEN MURPHY WALLACE PLLC
1601 Fifth Avenue, Suite 2100
Seattle, WA 98101-1621
Telephone: 206-447-7000

[XX] Hand Delivery

Attorney for Appellant Northshore United Church of Christ:

Anthony L. Rafel, Esq. WSBA #13194
Lisa Hayes, Esq. WSBA #29232
RAFEL MANVILLE PLLC
999 Third Avenue, Suite 1600
Seattle, WA 98104-4019
Telephone: 206-838-2660

[XX] Hand Delivery

COURT:

Clerk - Court of Appeals, Division I
600 University St.
Seattle, WA 98101

[XX] Hand Delivery

DATED this 30th day of October, 2006.

Deanna Miller

DEANNA MILLER